

California Environmental
Protection Agency

California CUPA
Forum



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GUIDANCE FOR

ADMINISTRATIVE ENFORCEMENT

ORDER

AND

HEARING PROCEDURES

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I. INTRODUCTION

This *Guidance for the Administrative Enforcement Order and Hearing Procedures* is a training tool to assist Certified Unified Program Agencies (CUPAs) and their Participating Agencies (PAs) [collectively called Unified Program Agencies (UPAs)] in developing and implementing their Administrative Enforcement Order (AEO) Program. In contrast to other enforcement options that are specific to a single program element, the AEO authority is a consistent, formal enforcement option that can be used by UPAs to address violations in five of the six program elements (Hazardous Waste Generator and Tiered Permit, Underground Tank, Above Ground Tank, Business Plan, and Cal/ARP). Violations of Article 80 of the Fire Code are not covered under the AEO authority described in this document. However to the extent that these Article 80 violations are the same as Business Plan violations under HSC, Chapter 6.95, the AEO option can be used to cite the appropriate HSC, Chapter 6.95 violation.

Sections of this guidance are specific to an individual program element and detail statutory, regulatory, policy relationships, definitions, and penalties that may differ between elements. The remaining sections of this guidance that discuss actual order preparation, issuance, settlement, and follow-up are the same for any order issued for violations of any of the five program elements. Under the process described in this guidance, a single order can be used to address all violations of the five program elements detected in an inspection. This document also provides a variety of options or approaches for using the AEO process (see chart 1b). Each UPA can use any or all options based on their program needs and the specifics of each case.

All UPAs are required to have an Inspection and Enforcement Plan that outlines the various protocols that might be undertaken to enforce the applicable laws and regulations found within each Unified Program (UP) element. UPAs have a wide variety of enforcement response options (see Chart 1a) that should be used appropriately to address the wide range of violations and violators that may be encountered. A UPA's Inspection and Enforcement Plan should be amended to include the expanded AEO authority that became available on January 1, 2003 for specific violations of HSC, Chapters 6.5 (Hazardous Waste Generator and Tiered Permit), 6.7 (Underground Tanks), 6.95 (Business Plan and Cal/ARP), 6.67 (Above Ground Tanks) and implementing regulations.

Similar to any enforcement activity, the use of Administrative Enforcement Orders should be coordinated with other State and Federal enforcement agencies that may also have an enforcement interest in that regulated entity.

This **guidance** provides sample language and recommendations consistent with the ***Guidance for the Preparation of Inspection and Enforcement Program Plans*** issued in February 2000.

Forms that may be useful to UPAs in the AEO process are found in a separate document titled “AEO Forms”. It contains an index of the forms and a brief summary of each form’s applicability. The forms are referenced by number (e.g., AEO 01) in the text of this guidance.

Nothing in this document is intended to preclude Unified Program Agencies from pursuing other formal enforcement options available under existing law.

Many thanks to the UPAAG Enforcement Workgroup members for their hours of work on this project: Bill Jones (LA County Fire) and Larry Matz (DTSC) – co-chairs; Lisa Brown (Cal/EPA); Dennis Karidis (Cal/EPA); David Boyers (SWRCB); Liz Haven (SWRCB); Leslie Alford (SWRCB); Julie Berrey (SWRCB); Chuck McLaughlin (DTSC); Mickey Pierce (DTSC); Doug Snyder (San Bernardino Fire); and Jim Sullivan (US-EPA).

Chart Ia: Selecting an Appropriate Enforcement Response

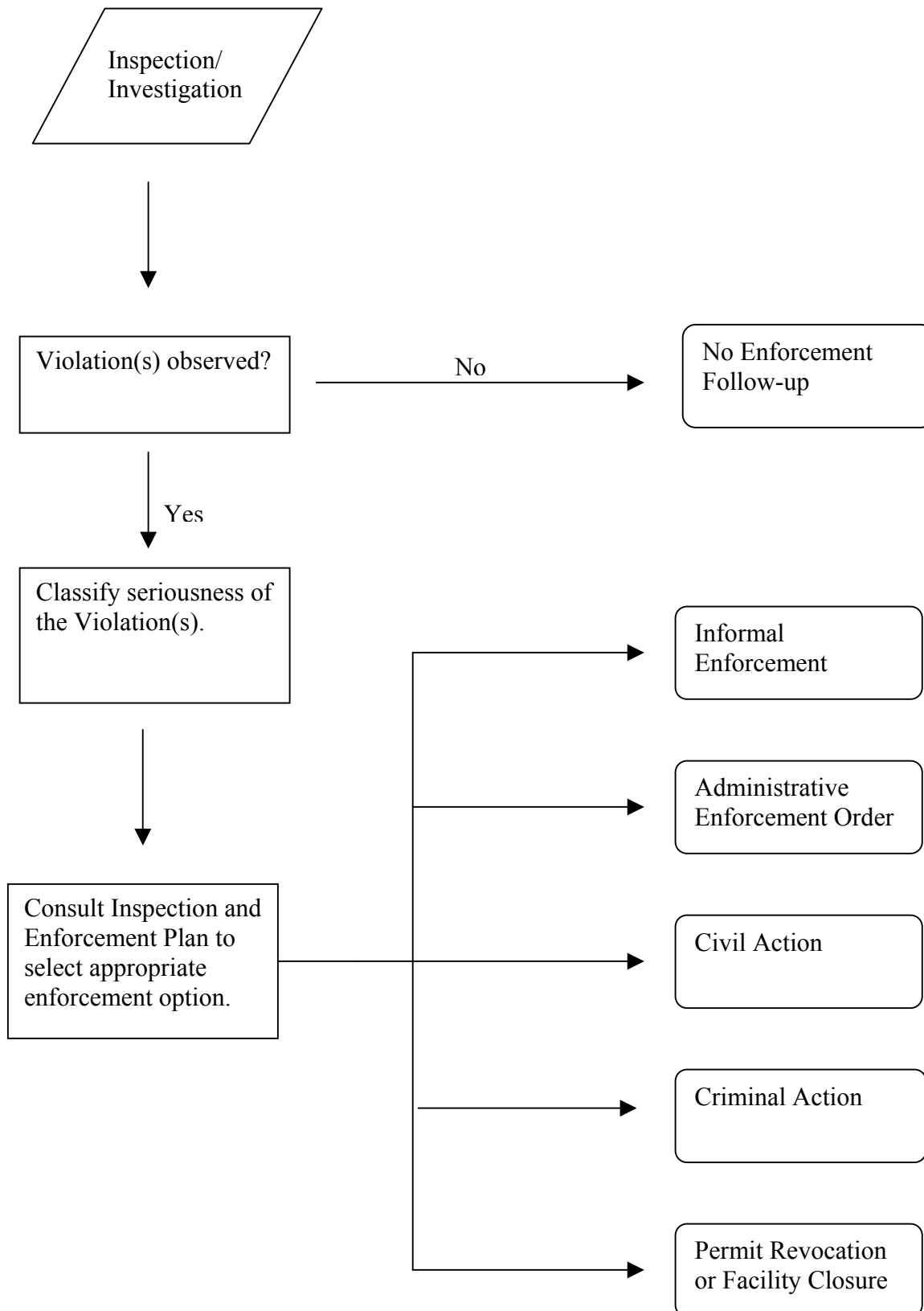
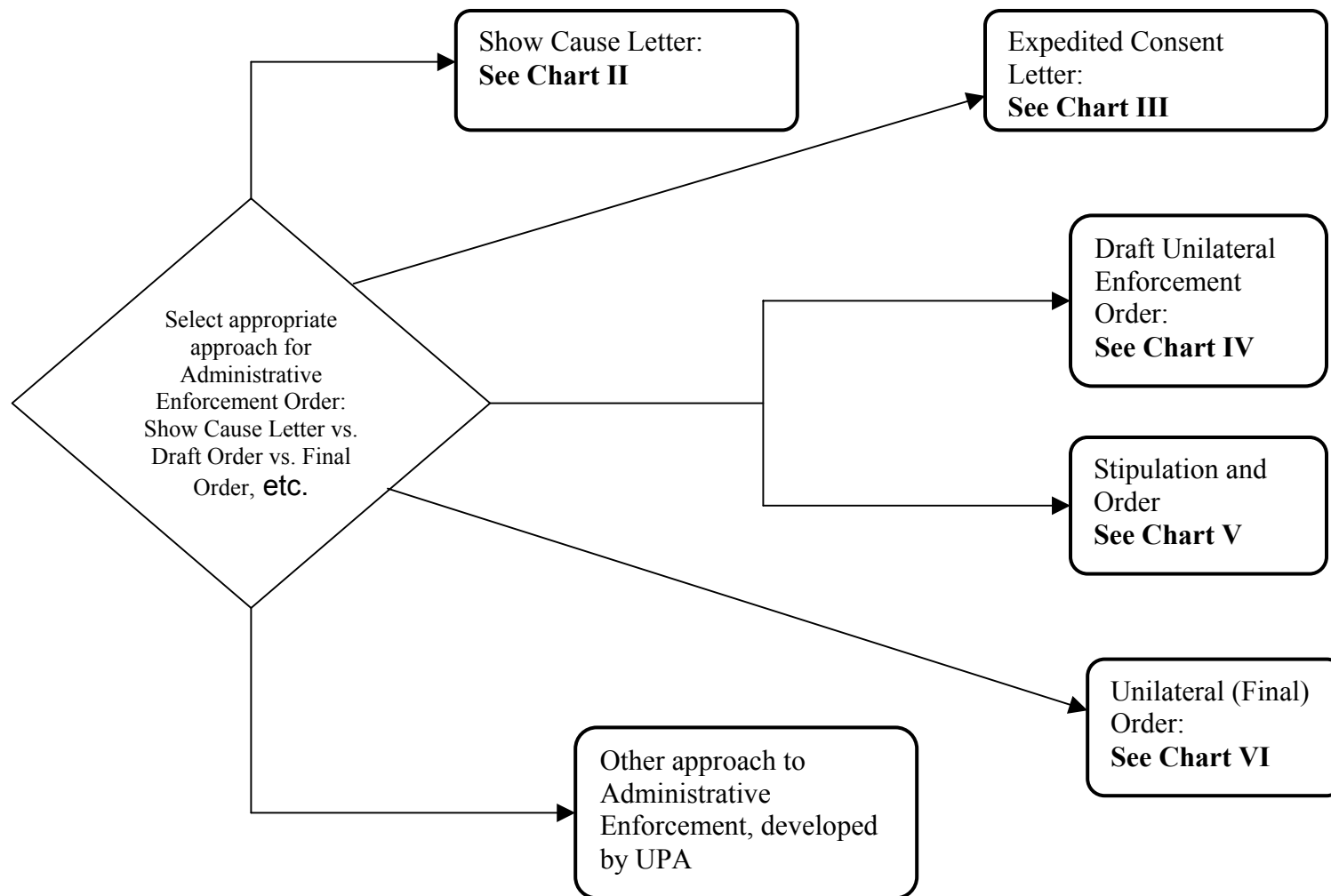


Chart Ib: Selecting an Approach to Administrative Enforcement



II. STATUTORY AUTHORITY

A. California Health and Safety Code, Chapter 6.11, Section 25404.1.1 [Assembly Bill 2481]

If the Unified Program Agency determines that a person has committed, or is committing, a violation of any law, regulation, permit, information request, order, variance, or other requirement that the UPA is authorized to enforce or implement pursuant to this chapter, the UPA may issue an Administrative Enforcement Order requiring that the violation be corrected and imposing an administrative penalty. This authority can be used to address violations of the following requirements:

- Hazardous Waste and Tiered Permitting Program: Health and Safety Code (HSC), Chapter 6.5 (commencing with Section 25100).
- Underground Storage Tank Program: HSC, Chapter 6.7 (commencing with Section 25280). Not including violations of corrective action requirements established by or issued pursuant to Section 25296.10. [HSC, Section 25299 (d)]
- Above Ground Storage Tank Program: HSC, Chapter 6.67, Section 25270.5.
- Hazardous Materials Release Response Plans: HSC, Chapter 6.95, Article 1 (commencing with Section 25500).
- California Accidental Release Prevention Program: HSC, Chapter 6.95, Article 2 (commencing with Section 25531).

III. DEFINITIONS

A. Unified Program

1. Formal Enforcement *[Title 27 CCR §15110]*

Formal enforcement is an action that mandates compliance and initiates a civil, criminal, or administrative process that results in an enforceable agreement or order. Enforceable means the instrument creates an independent, affirmative obligation to comply and imposes sanctions for the prior failure to comply. Sanctions include fines and penalties as well as other tangible obligations, beyond returning to compliance, that are imposed upon the regulated business.

2. Administrative Enforcement

Administrative enforcement allows a UPA to pursue an action independent of an outside prosecutorial agency. The UPA also determines an appropriate penalty based on the circumstances of the violation and the violator, and statutory or regulatory penalty criteria. The UPA may set the penalty and the time frame for the violator's return to compliance. If the alleged violator chooses to contest the case, the UPA schedules a hearing at which there is the opportunity to refute the allegations and to present any mitigating factors that may affect the penalty. Administrative enforcement has several possible advantages:

- Provides adequate enforcement response for cases requiring formal action/penalty but are not appropriate for referral to an outside prosecutor;
- May be less resource intensive than other types of formal enforcement;
- Generally produces a quicker response than criminal and civil enforcement;
- Preserves regulatory agency control over the process;
- Has less formal rules of evidence as compared to criminal or civil enforcement; and
- When other prosecutorial resources are limited, this may be the only formal enforcement process available for a particular violation;

3. Administrative Enforcement Order

For the purpose of this guidance, the term: "Administrative Enforcement Order" (AEO), includes any of the order variations including the Consent Order, Expedited Consent Order, Stipulation and Order, and Unilateral Order.

4. Minor Violation [*HSC Chapter 6.11, §25404(a)(3)*]

"Minor violation" means the failure of a person to comply with any requirement or condition of any applicable law, regulation, permit, information request, order, variance, or other requirement, whether procedural or substantive, of the Unified Program that the UPA is authorized to implement or enforce pursuant to this chapter, and that does not otherwise include any of the following:

- (a) A violation that results in injury to persons or property, or that presents a significant threat to human health or the environment.
- (b) A knowing willful or intentional violation.
- (c) A violation that is a chronic violation, or is committed by a recalcitrant violator. In determining whether a violation is chronic or a violator is recalcitrant, the UPA shall consider whether there is evidence indicating that the violator has engaged in a pattern of neglect or disregard with respect to applicable regulatory requirements.
- (d) A violation that results in an emergency response from a public safety agency.
- (e) A violation that enables the violator to benefit economically from the noncompliance, either by reduced costs or competitive advantage.
- (f) A class I violation as provided in Section 25117.6.
- (g) A class II violation committed by a chronic or a recalcitrant violator, as provided in Section 25117.6.
- (h) A violation that hinders the ability of the UPA to determine compliance with any other applicable local, state, or federal rule, regulation, information request, order, variance, permit, or other requirement.

Note: Health and Safety Code Section 25404.1.2.(a)(2) states, "In any proceeding concerning an enforcement action taken pursuant to this section, there shall be a rebuttable presumption upholding the determination made by the UPA regarding whether the violation is a minor violation."

5. Respondent [*Government Code (GC) §11500(c)*]

For purposes of this guidance, a respondent is the person or business that is the alleged violator in an AEO.

6. Supplemental Environmental Projects

(SEP) means an environmentally beneficial project or projects that a business agrees to undertake in settlement of an enforcement action, but which the business is not otherwise legally required to perform. For further information please refer to *DTSC*, *SWRCB*, *Cal/EPA* and *USEPA* SEP policies.

7. Final Order

A Final Order means an AEO that has been formally issued with consent or without the consent (Unilateral) of the respondent and the time period for the respondent to request an administrative hearing has elapsed.

8. Unified Program Agency [HSC §25404(a)(1)(C)]

(UPA) means a Certified Unified Program Agency (CUPA) or Participating Agency (PA) that has enforcement authority and responsibility for any element(s) of the Unified Program.

9. Multi-Agency

Multi agency means more than one agency is responsible for Unified Program elements at a single facility and may be involved in a single administrative enforcement order.

B. Hazardous Waste Program

1. Class I Violation [HSC Chapter 6.5, §25110.8.5]

Class I violation means any of the following:

- (a) A deviation from the requirements of this chapter or any regulation, standard, requirement, or permit or interim status document condition adopted pursuant to this chapter that is any of the following:
 - (1) The deviation represents a significant threat to human health or safety or the environment because of one or more of the following:
 - The volume of the waste.
 - The relative hazard of the waste.
 - The proximity of the population at risk.

(2) The deviation is significant enough that it could result in a failure to accomplish any of the following:

- Ensure that hazardous waste is destined for, and delivered to, an authorized hazardous waste facility.
- Prevent releases of hazardous waste or constituents to the environment during the active or post closure period of facility operation.
- Ensure early detection of releases of hazardous waste or constituents.
- Ensure adequate financial resources in the case of releases of hazardous waste or constituents.
- Ensure adequate financial resources to pay for facility closure.
- Perform emergency cleanup operations of, or other corrective actions for, releases.

(b) The deviation is a class II violation, which is a chronic violation or committed by a recalcitrant violator.

In determining whether a violation is chronic or a violator is recalcitrant, the local agency authorized to enforce this chapter shall consider whether there is evidence indicating that the violator has engaged in a pattern of neglect or disregard with respect to the requirements of this chapter.

[HSC Chapter 6.5, §25117.6]

2. Class II Violation *[Title 22 CCR, §66260.10 “Class II Violation”]*

Class II violation means a deviation from the requirements specified in HWCL, or regulations, permit or grant of authorization, or conditions, standards, or requirements adopted pursuant to HWCL, that is not a Class I violation.

3. Significant Non-Complier (SNC) *[DTSC’s Enforcement Response Policy]*

A business that has caused actual exposure or substantial likelihood of exposure to hazardous waste or hazardous constituents; or

- Is a chronic (a handler who is regularly found to have many Class I or Class II violations) or recalcitrant violator (a handler who actively refuses to comply with the regulatory requirements); or

- Substantially deviates from the terms of a permit, order, settlement document, or decree by not meeting the requirements in a timely manner and/or by failing to perform work as required by terms of permits, orders, settlement agreements, or decrees; or
- Substantially deviates from statutory or regulatory requirements.

C. Underground Storage Tank Program

- 1. Significant Violation:** The State Water Resources Control Board is currently developing regulations to define significant violations for the purposes of red tag authority. Administrative Enforcement Orders can be used in addition to the red tag authority for significant violations.
- 2. Significant Violation with Imminent Threat:** The State Water Resources Control Board is currently developing regulations to define significant violations that pose an imminent threat to human health and safety for the purposes of red tag authority. Administrative Enforcement Orders can be used in addition to the red tag authority for significant violations that pose an imminent threat.

IV. ROLES AND RESPONSIBILITIES

A. Single Agency

1. Counsel

It is recommended that each UPA consult with counsel regarding implementation of AEO authority within its jurisdiction. Counsel should be available to represent the UPA in formal hearings. Options for counsel include county counsel, city attorneys, or district attorneys. It is also recommended that counsel review documents and be involved to the extent possible with individual AEOs.

2. Signature Authority for Issuance/Settlement

Each UPA should designate the appropriate level of responsibility for signing all documents related to the issuance of AEOs. Form AEO 03 may be useful for signoffs.

3. Assignment of Tracking Number

It is recommended that each UPA develop a case tracking system to be used to track each AEO. An example for the tracking number might be EM00-001 where “EM” is the UPA district designation, “00” is the year and “001” is the case number. All data elements should conform to the T27 data dictionary. A tracking system should incorporate the following data elements:

- Case #
- Respondent information (name, address, phone number)
- Type of business
- Program element(s)
- Violations noted (Form AEO 13)
- Total penalties assessed
- Cost recovery
- Other credits (e.g. Supplemental Environmental Projects)
- Total penalties collected
- Date total penalty collected (in total)

4. Internal Review/Approval

Statute and regulations do not mandate specific internal review/approval procedures. Internal review and approval of AEOs are dependent on the size and complexity of the UPA organization. Generally, staff supervisors have a responsibility to review all work, including draft AEOs. However, draft AEOs may warrant a higher level of approval and possible interaction between different sections or units before final approval is granted. Each UPA should determine its own level of internal review and approval for all aspects of the AEO process.

The following is an example of an internal review/approval and responsibilities policy that might be used by a more complex UPA. A smaller UPA would be likely to utilize a less complicated internal review and approval process:

The Director/Chief shall:

Review and sign AEOs (e.g. Unilateral Orders), settlement documents (e.g. Orders and Stipulations, Consent Orders), and other documents generated for respondents with penalty assessments of \$500,000 or more.

Program Managers shall:

1. Review and sign AEOs (e.g. Unilateral Orders), settlement documents (e.g. Orders and Stipulations, Consent Orders), and other documents generated for respondents with penalty assessments of less than \$500,000.
2. Routinely (at least monthly) meet with all supervisors to discuss potential AEOs for accuracy and consistency.
3. Conduct informal conferences with the respondents for the purposes of explaining or negotiating the penalty.

Supervisors shall:

1. Determine whether an AEO is the appropriate enforcement response option for the violations identified.
2. Ensure appropriate evidence supports all violations alleged in the AEO.
3. Review and approve all draft AEOs prepared by staff within their respective units.
4. Review all potential AEO cases for possible criminal referral.
5. Ensure that the AEOs and other supporting documents are produced and issued in a timely manner.

Line Staff shall:

1. Conduct inspections of regulated entities and/or respond to complaints.
2. Gather and preserve evidence indicating a violation has occurred.
3. Prepare AEOs when appropriate (see AEO protocols for detailed instructions).
4. Attend and participate in informal conferences and formal hearings.

B. Multi-Agency

It is recommended that each UPA with enforcement responsibilities at a common regulated entity, meet and discuss coordination issues prior to issuing an order to that entity. While each jurisdiction will have unique issues and concerns relative to the joint issuance of

orders, it is desirable to have a single order issued for multiple violations at a single entity. Options include one order with multiple signatures (representing each UPA) or issuance of separate independent orders from each UPA. Separate orders may be issued depending on the complexity of coordination issues. Coordination should include timing of order issuance, discussion of total penalties, penalty assessment per program element, potential maximum penalty reductions and implementation of compliance mandates.

1. Counsel

The agencies involved should decide how counsel will work together to determine how to facilitate the order (for example who will issue the order, joint or separate signatories, conduct settlement negotiations etc).

2. Signature Authority for Issuance/Settlement

The UPAs involved in the joint issuance of an order should determine the appropriate signatory or signatories for signing all documents related to the issuance of AEOs.

Form AEO 03 may be useful for signoffs.

3. Assignment of Tracking Number

It is recommended that agencies develop a joint case tracking system to be used for all documentation for a particular multi-agency case. An example for the tracking number might be MA00-001 where “MA” is the multi-agency designation, “00” is the year and “001” is the case number. All data elements should conform to T27 data dictionary. A tracking system should incorporate the same data elements as the single agency tracking system.

4. Internal Review/Approval

While each UPA will need to determine its own level of internal review and approval for all aspects of the AEO process, multi agency actions require a coordinated review/approval process. While each agency shares responsibility for the AEO, detailed review of the violations and penalties assessed are generally conducted by the agency with responsibility for that program element within the joint order.

V. ADMINISTRATIVE ORDER ISSUANCE AND SETTLEMENT PROCESS

A. Introduction

UPAs are authorized by HSC §25404.1.1 to issue administrative enforcement orders that impose penalties. The goals of the AEO are to return a facility to compliance in a timely manner, eliminate illegally obtained economic benefit, punish the violator, and deter future non-compliance. To expedite achieving the enforcement goal as efficiently as possible, the UPA should encourage the respondent to enter into settlement discussions. Settlement discussions can occur at any time.

This guidance assumes the UPA has completed the necessary documentation, such as inspection or investigation reports, and followed the appropriate regulations and policies necessary to make the determination that an AEO is appropriate given the circumstances.

There are different procedures that may be used to initiate the issuance of an AEO. For example, a draft AEO may be sent to the respondent as a first step, or a letter may be sent informing the respondent that the UPA intends to issue an AEO. This guidance provides several options for the issuance and finalization of the AEO. It is up to the UPA to decide which option is appropriate. Other options not described may be used as long as they comply with the procedural requirements of the Health and Safety Code.

B. Timeliness of Enforcement Actions

One of the goals of the UPA Inspection and Enforcement program is to take timely enforcement actions. To achieve that goal, each UPA should establish appropriate timelines for major milestones throughout its inspection and enforcement process. These timelines are goals that the UPA establishes to ensure internal accountability and reduce unnecessary delays in making appropriate progress.

Timely enforcement is measured from the date of the inspection when the violations were first detected. For the Hazardous Waste Program, HSC §25185(c)(2) requires that inspection reports be mailed to businesses within 65 days of the inspection. If an AEO is the selected enforcement option, DTSC's Enforcement Response Policy establishes a goal of issuing a Final Order within 180 days of the inspection. If this goal cannot be achieved,

management should be consulted. UPAs should have a similar policy established in their Enforcement Plan to ensure AEOs are issued in a timely manner.

C. Options for Administrative Enforcement Order Issuance

The UPA may use the procedures identified in this guidance (see Chart 1b) in initiating, settling, and issuing administrative orders under HSC §25404.1.1. A UPA may decide to use these or other alternatives that result in a Final Order with compliance mandates and an appropriate penalty. Any option chosen must meet the requirements of HSC §25404.1.1.

1. “Show Cause” Letter

The Show Cause letter is the most commonly used and recommended option. The UPA issues a Show Cause letter (Form AEO 06) to the respondent notifying that the UPA is planning to take an AEO action and encouraging the business to contact the UPA to discuss settlement.

The goal of this process is to enter into settlement discussions between the respondent and the UPA; reach agreement on compliance, timelines and penalties; and formalize the agreement in an Enforcement Order.

The UPA must be prepared to issue a Unilateral Order (Form AEO 05) in cases where the respondent fails to reply to the notice or settlement discussions fail to result in an agreement. When entering into settlement discussions, the UPA should establish deadlines for reaching agreement. When deadlines pass, the UPA should take the next step by issuing a Unilateral Order.

The Show Cause letter does not constitute a formal enforcement action. The letter establishes the UPA’s intent to pursue formal enforcement and encourages a consensual resolution.

Advantages and Disadvantages

The advantages of the “Show Cause” letter are that it:

- Reduces the number of steps in the AEO process;

- Provides the respondent with an expedited process for resolving the violations;
- Provides for respondent input prior to the issuance of an AEO;
- Does not start the statutory time frame for hearings; and
- Allows for early discussion of the violations and avoids the possibility of the UPA having to formally amend or retract a Final Order.

The disadvantage is that the statutory timeframes for filing a notice of defense are not triggered; and therefore, a deadline is not established. If immediate action is required, this option may not be appropriate.

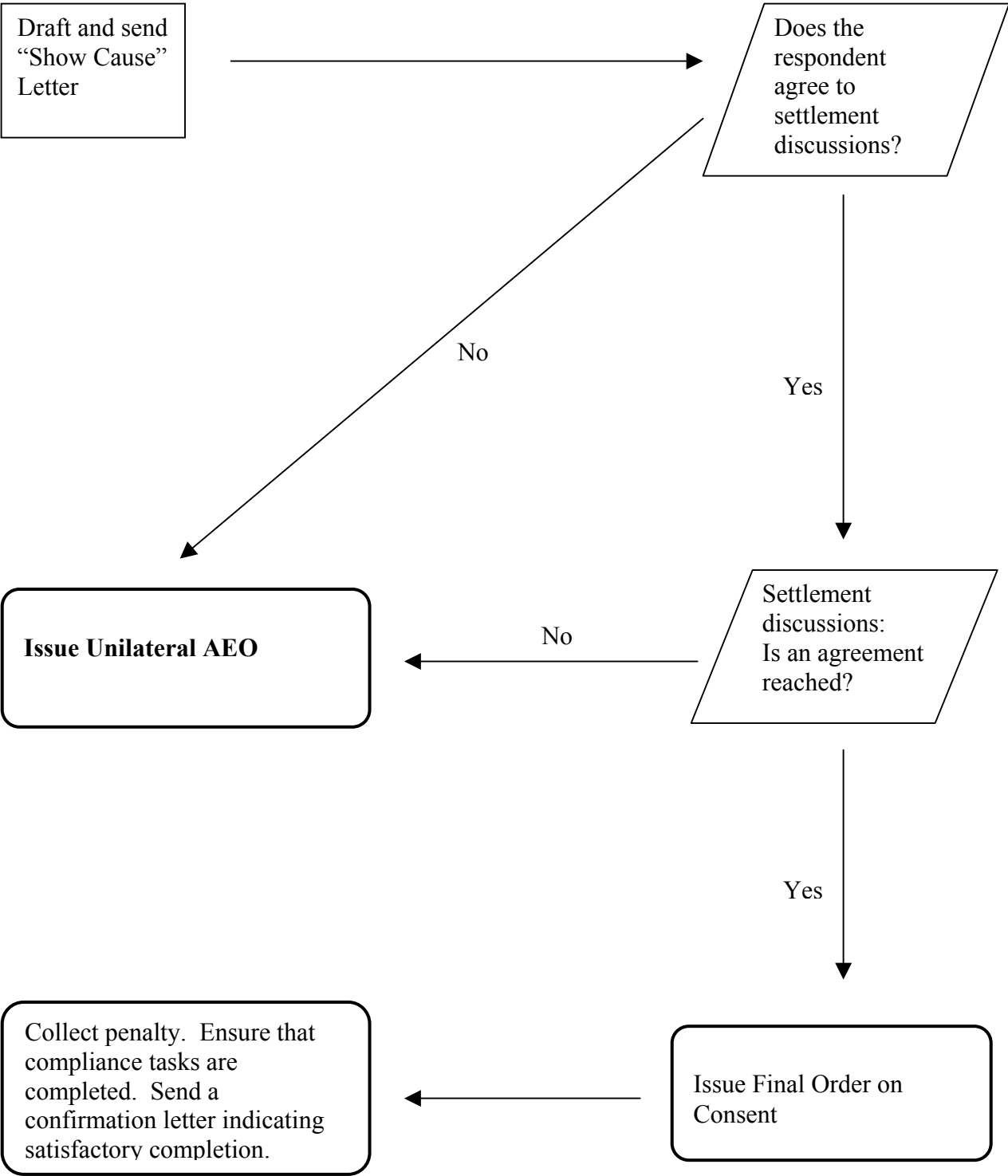
Elements of the “Show Cause” letter *(See Form AEO 06)*

Show Cause

Steps in the process

1. Draft and send a “Show Cause” letter.
2. If the respondent agrees, set up settlement discussions.
3. Conduct settlement discussions.
4. If an agreement is reached, complete and mail a Final Order.
5. If no response is received to the “Show Cause” letter or if settlement is not achieved, issue a Unilateral Order.
6. If settlement is achieved, collect penalties and assure that compliance tasks are completed.

Chart II: The “Show Cause” Letter Approach to Administrative Enforcement



2. Expedited Consent Order

Under this alternative, the UPA may issue an Expedited Consent Order to the business and request, in a cover letter, concurrence and signature to finalize the order. This alternative can be used where the violation(s) are not in dispute. It provides quick means of resolution of simple cases, where the respondent is not likely to contest the order.

Advantages and Disadvantages

The advantages of the “Expedited Consent Order” alternative are that it:

- Is timely and cost effective for both parties;
- Is simple and straight forward; and
- Does not trigger the statutory timeframe for a Notice of Defense.

The disadvantages of the “Expedited Consent Order” alternative are that it:

- Provides limited opportunity for discussion of complex compliance issues;
- Is difficult for multi-agency enforcement; and
- Does not trigger the statutory timeframe for a Notice of Defense, so a deadline is not established.

Expedited Consent Orders may be appropriate

- Where violations are not in dispute;
- For simple, easily understood violations;
- When compliance issues are straightforward;
- When no compliance schedule is required;
- When not dealing with recalcitrant/repeat violators;
- When penalties are relatively small; and
- When prompt settlement is anticipated.

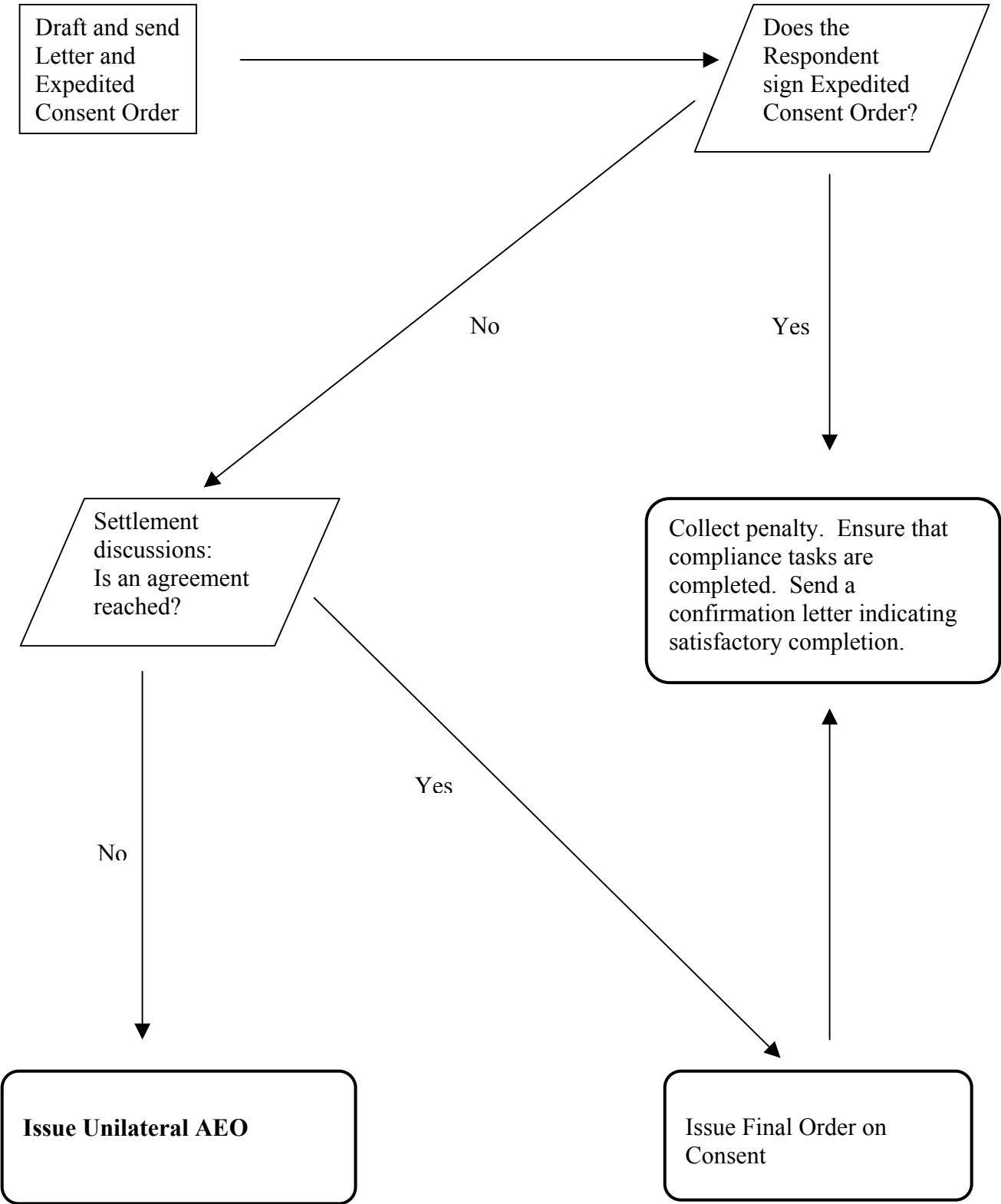
Elements of an Expedited Consent Order *(See Form AEO 20)*

Expedited Consent Order

Steps in the process

1. Prepare and mail draft Expedited Consent Order with penalty assessment to respondent for signature.
2. Respondent signs and returns Expedited Consent Order with payment.
3. Collect and distribute penalty and assure that compliance tasks are completed. Send confirmation letter to business indicating satisfactory completion with the Final Order on Consent.
4. If respondent does not agree to the sign order, initiate a draft Unilateral Order alternative.

Chart III: The Expedited Consent Order Approach to Administrative Enforcement



3. Draft Unilateral Order

Under this alternative the UPA would send a “draft” Unilateral Order with a cover letter to the respondent. The cover letter would state why the draft order is being sent and provide the respondent with a specified number of days to enter into settlement discussions before the actual Unilateral Order is issued. The failure of the respondent to answer the letter requires the issuance of a Unilateral Order.

The draft Unilateral Order is substantially the same as any other Unilateral Order, except that it has not been signed by the issuing UPA. It is similar to the Show Cause alternative because it initiates settlement discussions with the respondent.

Advantages and Disadvantages

The advantages of the draft Unilateral Order alternative are that it:

- Is more formal than the Show Cause alternative because it contains all the details of the alleged violations and the proposed penalties;
- Documents the violations and penalty and communicates them early;
- Is easy to quickly finalize;
- Does not start the statutory time frame for hearings, and
- Allows for early discussion of the violations and avoids the possibility of the UPA having to formally amend or retract a Unilateral Order.

The disadvantage is that the statutory timeframe for filing a notice of defense has not been triggered; and therefore, a deadline is not established.

Draft Unilateral Orders may be appropriate

- For more serious violations;
- For complex violations;
- When complex compliance issues are present;
- When a compliance schedule is required; and
- When prompt settlement is not anticipated.

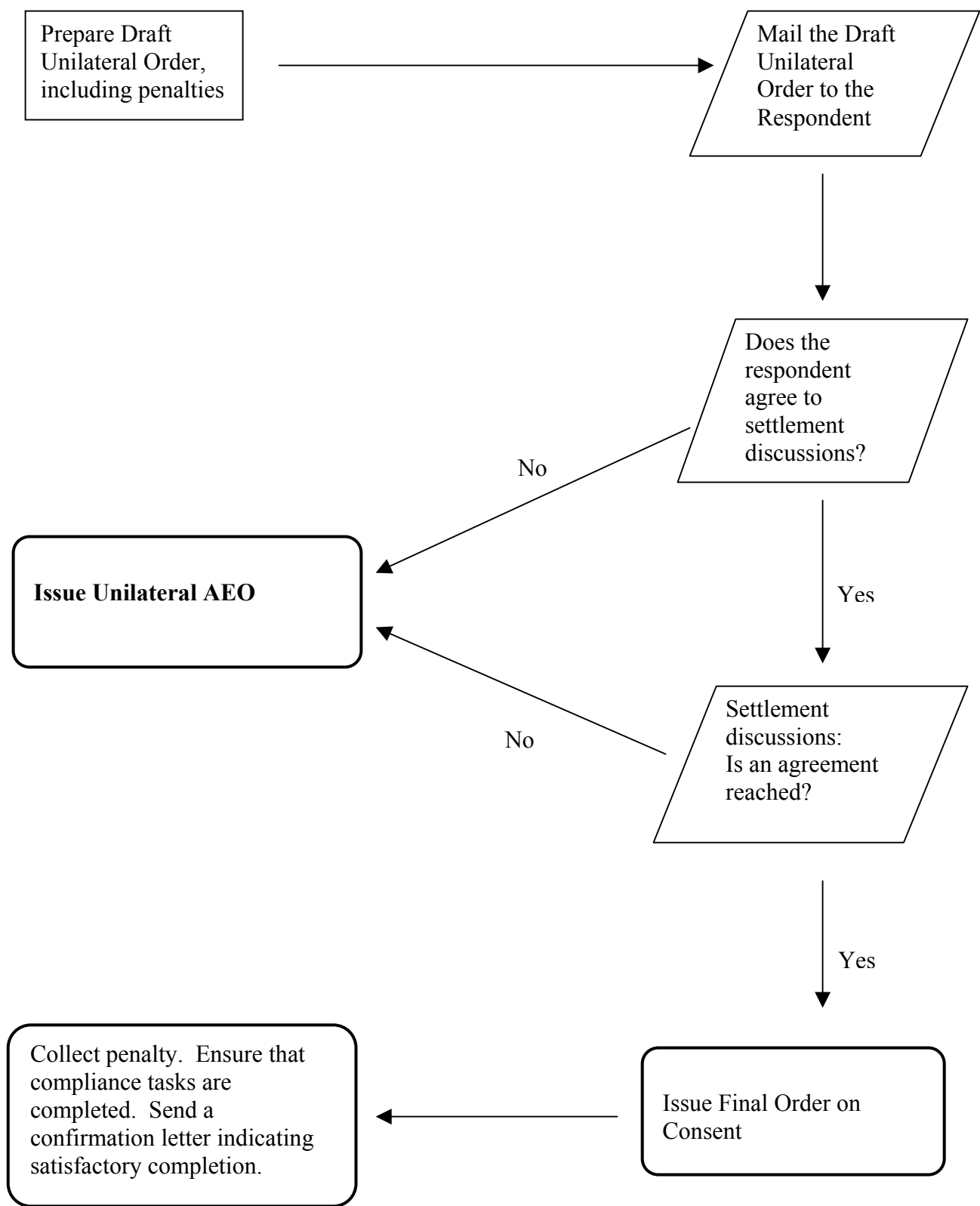
Elements of the Draft Unilateral Order (*See Form AEO 05*)

Draft Unilateral Order

Steps in the Process

1. Prepare and mail draft Unilateral Order with penalty assessment to respondent.
2. If the respondent agrees, set settlement discussions.
3. Conduct settlement discussions.
4. If settlement is reached, complete a Final Order on Consent.
5. Collect and distribute penalty and assure that compliance tasks are completed.
6. Send confirmation letter to business indicating satisfactory completion with the Final Order on Consent.
7. If respondent does not agree to settle issue a Unilateral Order.

Chart IV: The Draft Order Approach to Administrative Enforcement



4. Stipulation and Order

A Stipulation and Order is a mechanism that a UPA can use if it comes to an agreement (a stipulation) with a respondent after a Unilateral Order has been issued. A Consent Order can also be used. A Stipulation and Order does not require a restatement of the violations identified in the initial Unilateral Order. For this reason, the use of a Stipulation and Order may be more expeditious than the use of a Consent Order, in certain situations.

Advantages and Disadvantages

The advantages of the “Stipulation and Order” alternative are that it:

- Provides the respondent and the UPA with an expedited mechanism for settlement
- Does not require a restatement of the violations from the initial Unilateral Order;
- Like a Consent Order, provides a cooperative rather than contentious means of resolving the violations.

The “Stipulation and Order” alternative may be appropriate

- When a Unilateral AEO has already been issued for the violation or violations in question;
- When the respondent has requested settlement discussions after service of the Unilateral AEO;
- When settlement discussions have led to an agreement between the UPA and the respondent on compliance timelines and penalties.

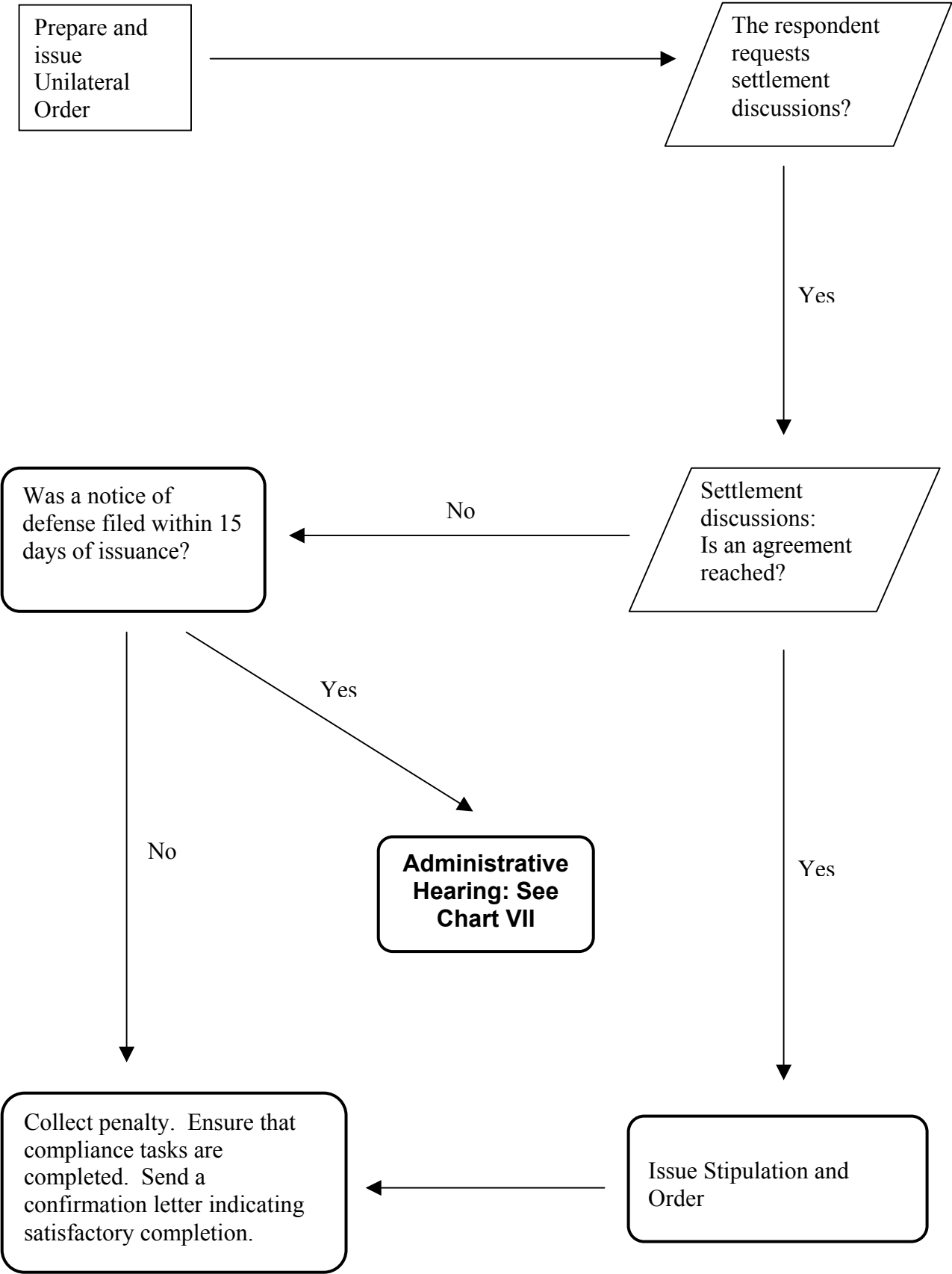
Elements of the Stipulation and Order (*See Form AEO 21*)

Stipulation and Order

Steps in the process

1. Prepare and issue the Unilateral Order including penalties and completion of the certificate of service.
2. If the respondent requests, set settlement discussions.
3. If settlement is reached, prepare Stipulation and Order.
4. Collect and distribute penalty and assure that compliance tasks are completed.
5. Send confirmation letter to business indicating satisfactory compliance with the Stipulation and Order.
6. If no agreement is reached, proceed to hearing (if respondent does not file a notice of defense within 15 days of issuance of a final order, the order becomes final without a hearing).

Chart V: The Stipulation and Order Approach to Administrative Enforcement.



5. Unilateral Order

Under this alternative, the UPA sends a complete, signed Administrative Order to the respondent without prior discussion or negotiation. The Show Cause and draft Unilateral Order alternatives anticipate the possibility of the issuance of a Unilateral Order, as a possible outcome. This alternative utilizes the issuance of a Unilateral Order as the initial step. (Unilateral Orders are not final until the hearing period has passed)

Advantages and Disadvantages

The advantages of the Unilateral Order alternative are that:

- Respondent may request a hearing within 15 days;
- Imminent and substantial endangerment finding requires immediate compliance, even if an appeal is filed; and
- Order is a public document.

The disadvantage of the Unilateral Order is that it doesn't allow consideration for the respondent's position prior to formal public action.

The Unilateral Order alternative may be appropriate

- When the respondent is a repeat violator of, or has a history of non-compliance with environmental or public safety laws;
- When the respondent has been recalcitrant or uncooperative;
- When the violations pose an imminent and substantial threat to public health or the environment; or
- When the violations have resulted in a significant release to the environment.

As previously noted, the Unilateral Order can be a necessary escalation when settlement is not achieved with the Show Cause or draft Unilateral Order alternatives. For elements of a Unilateral Order see Form AEO 05.

Preparing a Unilateral Order

When preparing a Unilateral Order, the following documents must be included in the package served on the respondent (Form AEO 04):

- A copy of the signed order (Form AEO 05)
- All exhibits referred to in the order
- Statement to the Respondent (Form AEO 09)
- A copy of proof of service (Form AEO 11)
- Cover letter to respondent (Form AEO 07)
- Two copies of Notice of Defense (Form AEO 10)

Serving the Order

H&SC section 25404.1.1(c) requires that an order shall be served in person or by certified mail. The more common method for serving an enforcement order is to mail the order by first-class certified mail, return receipt requested. H&SC section 25404.1.1(d) states that if no notice of defense is received within 15 days of service of the order, the order becomes final. It is good practice to allow an additional 5 days for mail delivery time (20 days total). If a notice of defense is received, a hearing must be scheduled within 90 days before the hearing officer selected by the respondent. For those selecting the State Administrative Law Judge (ALJ), refer to the procedures for accessing an ALJ through the State Office of Administrative Hearings (OAH) found in a separate document titled “Procedure for Accessing an Administrative Law Judge”. For those selecting a local hearing officer established by the UPA, set the hearing. A proof of service form (Form AEO 11) must be completed and included in the package.

Amending a Unilateral Order

There are two situations in which a Unilateral Order may be amended:

- When the respondent files a request for a revision and the UPA agrees the change is needed, the UPA makes the appropriate amendments and sends a copy to the respondent.
- When the UPA independently determines that a correction is necessary. To move above issuance of an amended Unilateral Order in this situation requires the re-issuance of the complete service package and may create new hearing rights.

Withdrawing an Order

If the UPA decides to withdraw a Unilateral Order, the UPA completes a Notice of Dismissal (Form AEO 17) and sends with a letter, return receipt requested, officially notifying the respondent that the order is being withdrawn.

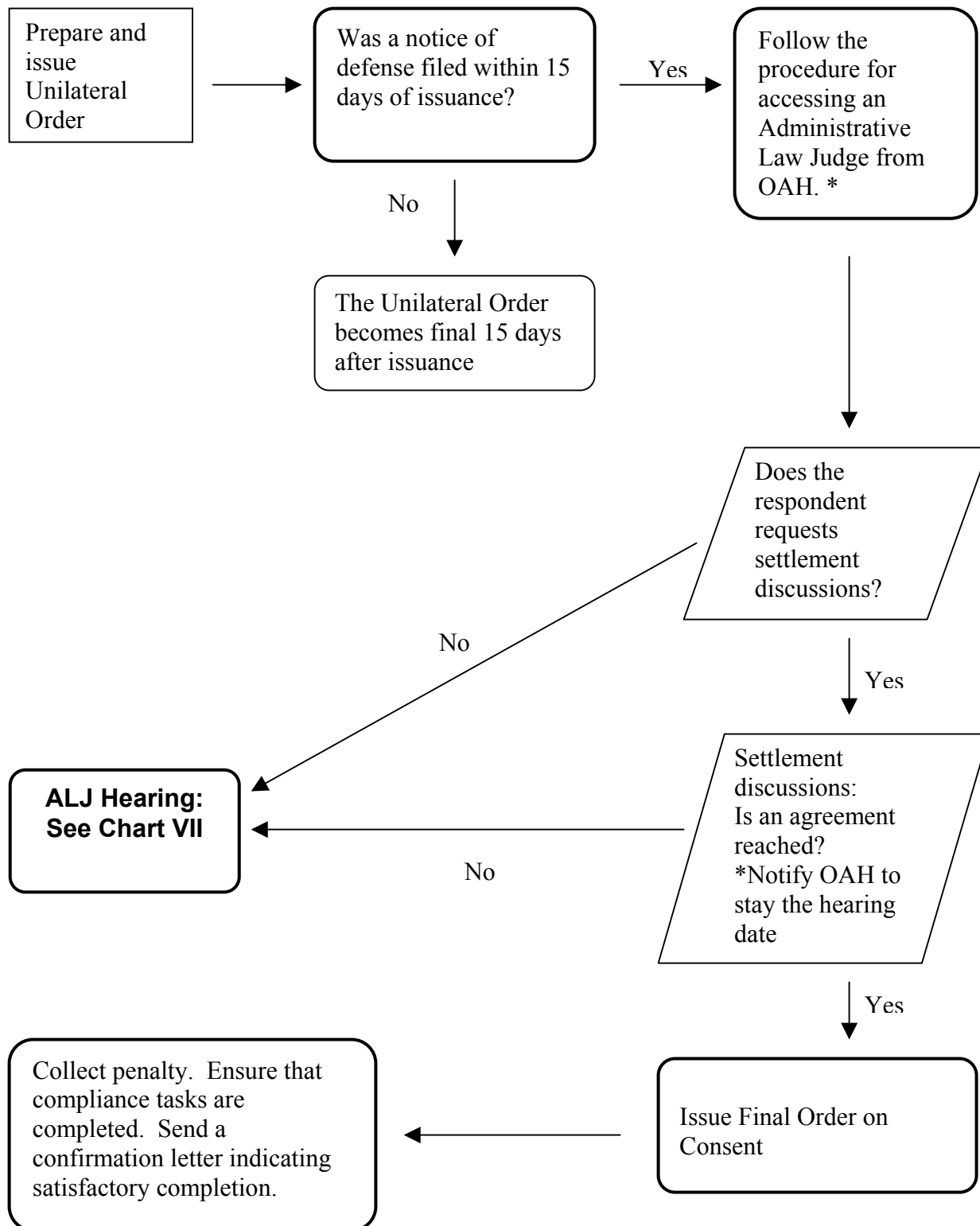
Elements of the Unilateral Order (*See Form AEO 05*)

Unilateral Order

Steps in the Process

1. Prepare and issue the Unilateral Order including penalties and completion of the certificate of service.
2. Respondent submits NOD and requests a stay while settlement discussions occur. Conduct settlement discussions. Reach agreement and issue final order on consent. If agreement cannot be reached, discontinue stay and go to item 4.
3. Respondent submits NOD without intent of conducting settlement discussions. UPA sends NOD to Office of Administrative Hearings (OAH). OAH assigns an Administrative Law Judge (ALJ) and a hearing is conducted within 90 days. (UPA and respondent may resolve the violations at any time with a Consent Order). An ALJ hears the case and issues a proposed decision. UPA either concurs, modifies or rejects decision. Respondent may appeal to Superior Court.
4. Respondent does not submit NOD. Order becomes final after 15 days. Rights to a formal hearing are forfeited.
5. Collect and distribute penalty and assure that compliance tasks are completed.

Chart VI: The Unilateral Order Approach to Administrative Enforcement



*If the UPA has established a local hearing officer and the respondent selects them, follow local procedures.

D. Settlement Discussions/Settlement Agreement

1. Settlement discussions between the UPA and the respondent can occur at any time in the process. The UPA should encourage settlement discussions whenever possible. Statutory time frames for requesting and proceeding to hearing may be stayed by agreement between the respondent and the UPA.
2. The UPA should set a time and place for any settlement discussion meeting. If the UPA and the respondent are able to reach settlement, the UPA will issue a Consent Order (Form AEO 20). At a minimum, a Consent Order shall mandate:
 - Compliance with applicable laws;
 - Payment of fees and/or costs due to the UPA; and
 - Payment to the UPA of any penalty assessed.

E. Administrative Hearings

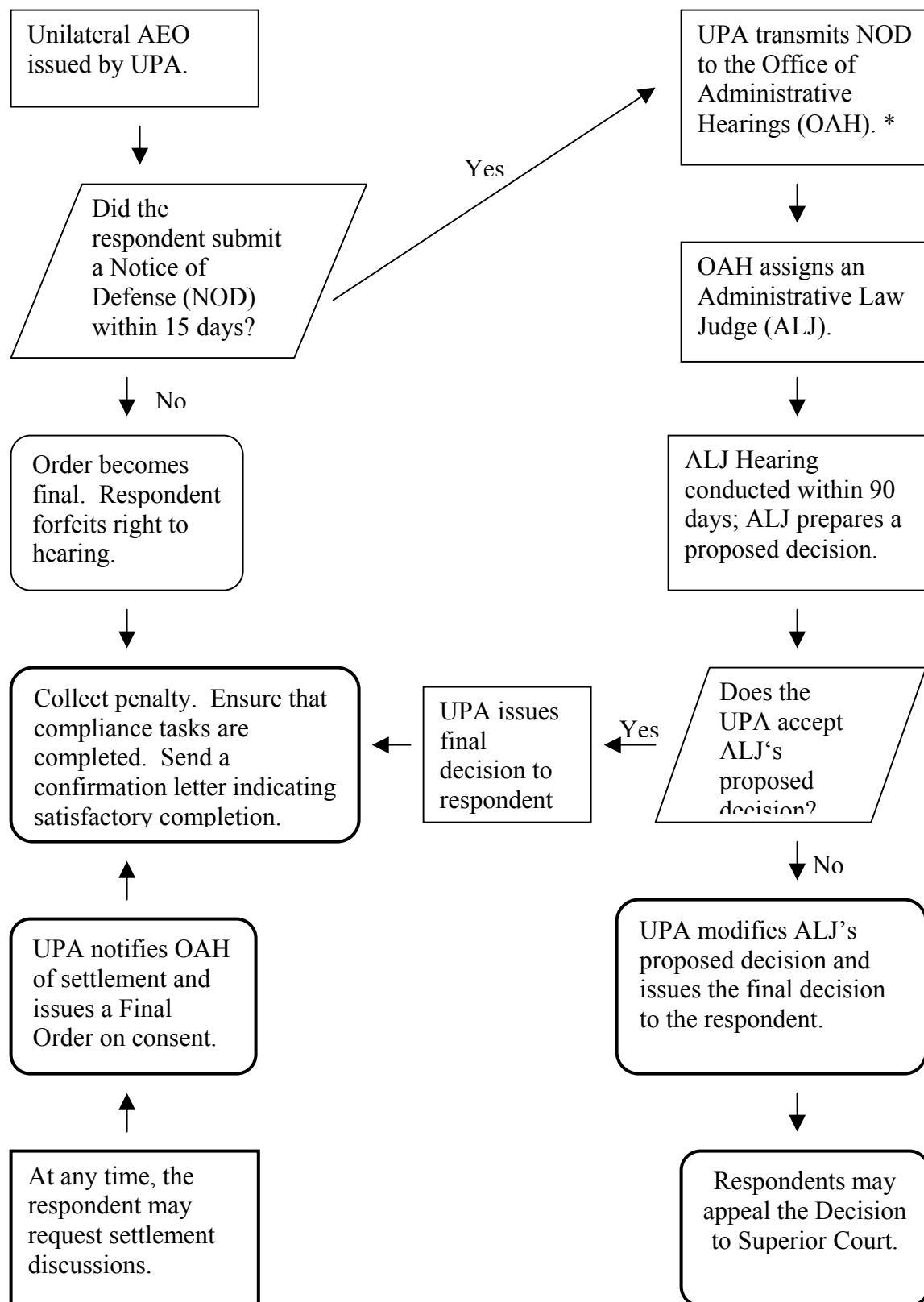
1. HSC § 25404.1.1. (d) allows the respondent to request a hearing on the order within 15 days after service of the order. This timeframe cannot be extended. A request for a hearing is referred to in HSC §25404.1.1. (d) as a “notice of defense” (Form AEO 10). The notice of defense must be filed with the UPA that issued the order within 15 days of service. It is acceptable if the Notice of Defense is postmarked within that 15 day period. If the respondent does not submit a notice of defense within the 15 days after service, the order becomes final.
2. If the UPA has procedures in place to designate a local hearing officer and receives a Notice of Defense (NOD) within the 15-day time period requesting a hearing before a local hearing officer, then the hearing officer is notified and the hearing is set based on local procedures. The local hearing officer shall conduct the hearing in accordance with the Administrative Procedures Act. (Government Code Section 11400 et seq.)
3. If a UPA receives a Notice of Defense (NOD) within the 15 day time period requesting a hearing before the Office of Administrative Hearings (OAH), it must immediately transmit the NOD to OAH (Refer to procedures for accessing OAH). Form AEO 15 is a cover letter to the presiding ALJ that accompanies an NOD transmitted by a UPA. The UPA must also notify the respondent that a hearing with an ALJ has been scheduled; form AEO 14 can be used for this purpose. OAH then has 90 days to hold the hearing. The 90 days may be extended upon mutual agreement (Form AEO 16).

4. While not required, it is generally advisable for UPAs to be represented by counsel during the OAH hearing process. Form AEO 19 includes the type of information that a respondent is legally obligated to provide prior to hearing. UPAs and respondents have similar discovery rights and obligations.
5. The UPA should remain in contact with the respondent and offer the opportunity to settle the case prior to the hearing date.
6. After the hearing, the Administrative Law Judge issues a proposed decision within thirty (30) days to the UPA. The UPA decides whether to adopt, modify, or reject the proposed decision. To adopt the proposed decision, the UPA serves the respondent with a letter, stating that it is adopting the proposed decision, and serves this package on the respondent. Such orders are effective and final upon issuance, and the respondent has 30 days to make payment. A copy of the order must be served by personal service or by certified mail.

F. Court Review

Within thirty(30) days after service of a copy of an Order issued by a UPA, the respondent may file with the Superior Court a Petition for Writ of Mandate for review of the Order. The filing of such Petition for Writ of Mandate does not stay any penalties assessed. Any Respondent who fails to file the Petition within this thirty(30) day period may not challenge the Order. *[Government Code §11523]*

Chart VII: The Administrative Hearing Process.



*If the UPA has established a local hearing officer and the respondent selects them, follow local procedures.

II. PENALTIES

A. Penalty Maximums and Calculations

Penalty maximums are set forth in statute for the Hazardous Waste, Underground Storage Tank, Above Ground Storage Tank, California Accidental Release Prevention, and Business Plan programs (See (a) – (e) below). Currently, the penalty calculation procedures are set forth in regulations (CCR Title 22 section 66272.60 - 66272.69) for calculating penalties for violation of the Hazardous waste requirements. No corresponding regulatory procedures exist for the other program elements. However, the statutory factors that must be considered in assessing hazardous waste penalties and any penalty under the 25404.1.1 authority are essentially the same. The rationale and process (not the amounts) in these regulations can also provide additional guidance for consistent calculation of penalties under other program elements. Please note that in no case can the penalty calculated exceed the statutory maximum for that program element.

1. Statute and Regulations

(a) Hazardous Waste

For violations of Health & Safety Code Chapter 6.5, the violator shall be liable for penalties as provided in section 25189.2 (a-c). Administrative penalties must be assessed following the procedures set forth in regulation (CCR Title 22 section 66272.60 - 66272.69). The total penalty calculated for any single violation shall not exceed the amount specified in statute; \$25,000 per day, per violation (HSC §25189.2).

(b) Underground Storage Tanks

For violations of Health & Safety Code Chapter 6.7, the violator shall be liable for a penalty as provided in section 25299(a-c).

HSC §25299(a) and (b) call for penalties no less than \$500 or no more than \$5,000 per day, per violation, per Underground Storage Tank.

For violations of HSC 25299(c), the respondent is liable for no more than \$5000 per day, per violation, per UST.

(c) Above Ground Storage Tank Program - For violations of Health & Safety Code Section 25270.5, the violator shall be liable for a penalty of not more than five thousand dollars (\$5,000) for each day on which the violation continues. If the violator commits a second or subsequent violation, a penalty of not more than ten thousand dollars (\$10,000) for each day on which the violation continues may be imposed.

(d) Hazardous Materials Release Response Plan Program - For violations of Health & Safety Code Chapter 6.95, Article 1, the violator shall be liable for a penalty consistent with the administrative penalties as described in section 25514.5.

HSC section 25514.5(a) establishes a penalty which shall be set by the governing body of the administering agency but not greater than two thousand dollars (\$2,000) for each day in which the violation occurs. If the violation results in, or significantly contributes to, an emergency, including a fire or health or medical problem requiring toxicological, health, or medical consultation, the business shall also be assessed the full cost of the county, city, fire district, local EMS agency designated pursuant to Section 1797.200, or poison control center as defined by Section 1797.97, emergency response, as well as the cost of cleaning up and disposing of the hazardous materials, or acutely hazardous materials.

HSC section 25514.5(b) establishes an administrative penalty for knowing violation after reasonable notice in an amount that shall be set by the governing body of the administering agency but not greater than five thousand dollars (\$5,000) for each day in which the violation occurs.

(e) California Accidental Release Prevention Program - For violations of Health & Safety Code Chapter 6.95, Article 2, the violator shall be liable for a penalty consistent with the administrative penalties as described in section 25540. or 25540.5.

25540(a) establishes a penalty of not more than two thousand dollars (\$2,000) for each day in which the violation occurs. If the violation results in, or significantly contributes to, an emergency, including a fire, the stationary source shall also be assessed the full cost of the county or city emergency response, as well as the cost of cleaning up and disposing of the hazardous materials.

25540(b) establishes a penalty for knowing violations after reasonable notice in an amount not to exceed twenty-five thousand dollars (\$25,000) for each day in which the violation occurs.

25540.5 states that any person or stationary source who violates any rule or regulation, emission limitation, permit condition, order, fee requirement, filing requirement, duty to allow or carry out inspection or monitoring activities, or duty to allow entry, established pursuant to this article and for which delegation or approval of implementation and enforcement authority has been obtained pursuant to subsections (l) and (r) of Section 112 of the Clean Air Act [42 U.S.C. Sections 7412(l) and 7412(r)] or the regulations adopted pursuant thereto, is strictly liable for a civil penalty not to exceed ten thousand dollars (\$10,000) for each day in which the violation occurs.

2. Statutory factors

H&SC section 25404.1.1(b) states that in establishing a penalty amount and ordering that the violation be corrected pursuant to this section, the UPA shall take into consideration the nature, circumstances, extent, and gravity of the

violation, the violator's past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health or safety or the environment, the violator's ability to pay the penalty, and the deterrent effect that the imposition of the penalty would have on both the violator and the regulated community.

3. Multi-day Violations

Multi-day penalties are set forth in statute for Hazardous Waste, Underground Storage Tank, Above Ground Storage Tank, California Accidental Release Prevention, and Business Plan programs as stated above under statutory and regulatory penalties. Title 22 Section 66272.65 addresses the calculation of multi-day penalties for Hazardous Waste violations. No corresponding regulations exist for the other program elements. The rationale and process found in these regulations provides for 2% of the penalty calculated for the first day of violation be multiplied by the total number of additional days the violation occurred to arrive at the total multi-day penalty. This penalty amount is then added to the amount calculated for the first day of violation. While not required for calculating multi-day penalties for other program elements, this process can be considered for additional guidance.

4. Multiple Violations

Calculation of multiple violations within an individual program element is found for the Hazardous Waste program under Title 22 Section 66272.64. No corresponding regulations exist for the other program elements. The rationale and process found in these regulations can provide additional guidance for calculating multiple penalties for each of the other program elements.

5. Multi-Program Violations

Calculation of penalties for violations of multiple program elements within the same order should begin with calculation of initial and multi-day penalties for each program element separately. Once the penalties within each program

element have been calculated, add the totals together into a single penalty amount for all violations addressed by that order.

6. Ability to Pay

The UPA is required to consider the respondent's ability to pay the assessed penalty (HSC 25404.1.1(b)). Often in the course of discussing settlements, respondents assert that they do not have the financial means to pay the proposed penalty or that paying the penalty will lead to bankruptcy or severe economic hardship. If ability to pay is at issue, the UPA should request from a respondent any financial information the UPA needs to evaluate the claim of financial hardship. A respondent that raises the issue has the burden of providing information to demonstrate financial hardship. It is recommended that the determination of ability to pay be made on the total penalty assessed in the order for all violations rather than separately for the penalty for each program element. It is recommended that any reduction to reflect the violator's inability to pay the entire assessment also be made to the total penalty and distributed proportionally to the penalties calculated for the individual program violations rather than to make this adjustment disproportionately in individual program element penalties.

US EPA uses financial models to help assist in determining a business's ability to pay. There are three applicable models accessible to CUPAs – ABEL, INDIPAY (Individual Ability to Pay), and BEN. ABEL (not an acronym) is used to assess a company's ability to pay proposed penalties. INDIPAY is used for the same purpose when the respondent is an individual or sole proprietor. BEN (also not an acronym) calculates the economic benefit of non-compliance and is typically reserved for cases where the economic benefit is substantial. These models can be found on the US EPA web site www.epa.gov/. However, the models are not definitive and often do not consider all the variables in a respondent's financial situation.

Financial information to request from for-profit entities may include the most recent three to five years of:

- Tax returns;
- Balance sheets;
- Income statements;
- Statements of changes in financial position;
- Statements of operations;
- Retained earnings statements;
- Loan applications, financing agreements, security agreements;
- Annual reports;
- Security and exchange filings.
- Credit report

The UPA may also use business service companies such as Dunn and Bradstreet to assist in determining ability to pay. If a respondent refuses to give the UPA the information to evaluate ability to pay, the UPA should seek the fully calculated penalty amount under the assumption that the respondent can pay.

B. Cost Recovery

There is no statutory provision for cost recovery in AEOs. Costs may be recovered in a negotiated settlement of an AEO. Cost recovery should never exceed actual costs.

C. Penalty Disposition

HSC, §25404.1.1(i) states that all administrative penalties collected shall be paid to the UPA that imposed the penalty, and shall be deposited into a special account that shall be expended to fund the activities of the UPA in enforcing this chapter.

D. Confidentiality of Financial Information

A respondent can claim confidentiality for financial information submitted to a public agency. If the respondent submits financial information without a confidentiality claim, the agency may release the information without further notice to the respondent.

Information in published annual reports or other published publicly available documents would not be entitled to confidential treatment.

UPAs should have a procedure in place for securing confidential business information in accordance with HSC Section 25173 & 22 CCR, section 66260.2 (HW program); HSC Section 25511, 25538, & 25506(a) (Business Plan & CalARP); and Public Records Act (Government Code), section 6254(v).

E. Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) can be sensitive, and a variety of complicated issues may apply. If SEPs are desired, UPAs are strongly encouraged to use counsel in developing and negotiating SEPs. DTSC, Cal/EPA, US EPA, and SWRCB have issued guidance on SEPs, which can be consulted. Cal/EPA's policy on SEPs can be obtained at:

<http://www.calepa.ca.gov/programs/enforce/ensec9.htm>

US EPA's policy on SEPs can be obtained at:

<http://www.epa.gov/compliance/resources/publications/civil/programs/sepbrochure.pdf>

VII. CASE CLOSURE

Final case closure includes collection of all penalties, verification of compliance and summary reporting.

A. Collection and Accounting for Penalties

Full penalties should be collected. A UPA should have a system to track payment, payment history and other necessary/required information. It is usually easiest to require full payment before issuance of a final order in a negotiated settlement.

B. Uncollected Penalties

Each UPA should discuss internal options for pursuing uncollected penalties. In the Hazardous Waste Program, one option for collecting penalties is to use HSC §25184.1 to convert the Final Order to a civil judgment. Other options include small claims court, internal and external collection agencies, liens, permit revocation, and/or referral to prosecutorial agency.

C. Verification of Compliance with Order

The UPA(s) should verify compliance with directives mandated by the enforcement order at or near the dates specified in the order. This does not preclude a facility from demonstrating compliance sooner. Verification can be by a site visit, compliance certification (e.g. Certificate of Compliance – Form AEO 12) by the respondent, or other documentation as deemed appropriate by the UPA.

D. Multi-agency

Agencies should discuss details of collection, penalty tracking and distribution before case closure. It is recommended that a single agency be designated to collect, track, and distribute penalties.

VIII. RESPONSE TO NON-COMPLIANCE WITH ORDER

A Final Order may be amended if the respondent requests, and the UPA agrees that an amendment is appropriate. Amendments may be requested if certain compliance tasks are legitimately taking longer than originally agreed. If the UPA receives a request for an amendment, the UPA should require that the respondent clearly document why the

amendment is needed and what measures will be taken to ensure that future amendments are not necessary.

If any respondent is found to be non-compliant with an AEO, the case should be referred to the appropriate prosecutorial agency (i.e. District Attorney, City Attorney, State Attorney General, US Attorney). Form AEO 02 is a checklist that can be used for such referrals. If no prosecutorial agency is willing to take the case, other formal enforcement options, including a referral to the appropriate state/federal agency, can be considered.

IX. APPENDIX TABLE

A.	Appendix I	Checklist for AEO Implementation
B.	Appendix II	Examples of Violations
C.	Appendix III	Penalty Regulations

APPENDIX I

CHECKLIST FOR AEO IMPLEMENTATION

Checklist 1: General Administrative Order Procedures	YES	NO	Comments
1) Did you consult with the DA or equivalent while preparing these procedures?			<i>See page 13. "Roles and Responsibilities: 1. Counsel"</i>
2) Does the UPA have written policies and procedures for what response to take when there are violations?			<i>A policy similar to DTSC's Enforcement Response Policy that outlines when to take informal or formal enforcement action. Formal enforcement includes administrative, civil or criminal.</i>
3) Does the UPA have written procedures for issuing informal actions such as Notice of Violation and Notice to Correct?			<i>See Chart 1a</i>
4) Does the UPA have written procedures for using the Show Cause approach?			<i>See page 17. "Options for Administrative Enforcement Order Issuance: 1. Show Cause"</i>
5) Does the UPA have written procedures for using an expedited consent letter?			<i>See page 21. "Expedited Consent Order Alternative"</i>
6) Does the UPA have written procedures on how to issue a unilateral administrative order?			<i>See page 30. This approach is required. Other approaches are optional. Docket log numbers or Tracking numbers.</i>
7) Does the UPA have written procedures on how to amend a unilateral order?			<i>See page 31. "Amending a Unilateral Order"</i>
8) Does the UPA have written procedures on how to withdraw an order?			<i>See page 32. "Amending a Unilateral Order"</i>
9) Does the UPA have written procedures on how to finalize a Consent Order?			<i>See page 27. "Stipulation and Order"</i>
10) Does the UPA have written procedures for issuing a Draft Order?			<i>See page 24.</i>

Checklist 1: General Administrative Order Procedures	YES	NO	Comments
11) Do the procedures identify the roles and responsibilities?			<i>Please refer to Checklist 2 for specific roles and responsibilities.</i>
12) Does the UPA have written procedures for certifying compliance with an administrative enforcement action?			<i>See page 44. "Verification of Compliance Order"</i>
13) Does the UPA have procedures for responding to a respondents non-compliance with an order, including referring a business to the DA, or equivalent?			<i>See Page 44. "Response to Non-Compliance with an Order"</i>
14) Does the UPA have procedures for entering inspection and enforcement data into a data collection system?			See Title 27.
15) Does the UPA have agreement with their DA, or equivalent, to provide legal representation at a hearing before an ALJ?			<i>See page 34. "Appeals to an Administrative Law Judge"</i>
16) Does the UPA have procedures for processing and acting upon the ALJ's proposed decision?			<i>See page 34. "Appeals to an Administrative Law Judge"</i>

Checklist 2: Specific Roles and Responsibilities.	Position/Person	Comments <i>See pages 13 - 16.</i>
1) Who conducts the inspection?		
2) Who reviews the inspection report?		
3) Who determines the appropriate enforcement approach?		
4) Who drafts the show cause letter, Draft order, Unilateral Order or Consent Order?		
5) Who calculates the penalty?		
6) Who reviews the penalty calculation?		
7) Who develops compliance tasks?		
8) Who assigns the tracking number for administrative orders?		
9) Who reviews the order?		
10) Who signs the order?		
11) Who serves the order to the respondent?		
12) Who at the UPA receives the Notice of Defense from the respondent?		
13) Who participates in settlement discussions?		
14) Who reviews ability to pay information?		

Checklist 2: Specific Roles and Responsibilities.	Position/Person	Comments <i>See pages 13 - 16.</i>
16) Who drafts the consent agreement (Stipulation and Order)?		
17) Who signs the consent agreement (Stipulation and Order)?		
18) Who sends the Notice of Defense to the OAL.		
19) Who represents the UPA before the ALJ.		
20) Who at the UPA does the ALJ send its decision to?		
21) Who at the UPA makes the final decision or modifies the ALJ's proposed decision?		
22) Who and where does the respondent send the penalty to?		
23) Who will enter data into the data system.		

Checklist 3: Timeliness of Enforcement	YES	NO	Number of Days	Comment <i>See page 17.</i>
<i>The UPA should establish time lines as goals for completing activities. When these time lines are not met, management should be consulted.</i>				
1) Number of days from inspection to completion of report.				<i>HSC §25185(c)(2): must be mailed to business within 65 days of inspection. SWRCB references?</i>
2) Number of days after report is completed to make the decision on appropriate enforcement.				
3) Number of days from enforcement decision to issuance of non-formal enforcement (NOV, Warning Letter, Notice to Correct, etc.)				
4) Number of days from enforcement decision to issuance of administrative enforcement				<i>DTSC's ERP establishes a 135-day goal from date of inspection for DTSC enforcement actions. SWRCB requirements?</i>
5) Number of days to issue or settle order.				

Checklist 4: Confidential Information	YES	NO	Comments <i>See page 43: "Confidentiality of Financial Information"</i>
<i>In the course of conducting investigations, the UPA may need access to material a business considers confidential. The UPA should be prepared to access this information and respect the claim.</i>			
1) Does the UPA have written procedures for maintaining both confidential business information and enforcement sensitive information?			
2) Does the UPA have a secure storage area for Confidential Business Information (CBI)?			
3) Does the UPA have procedures for how they will protect the request for confidentiality?			
4) Does the UPA have procedures for assessing a CBI claim (to either maintain or deny the claim)?			
5) Does the UPA have procedures for responding to a public records request when there is CBI claimed material in the file?			
6) Does the UPA have procedures for staff access to CBI claimed material?			<i>Who can access CBI material, how long can material be checked out, when checked out, how will material be protected.</i>
7) Does UPA have a training class or certification procedures for certifying staff that are authorized access to CBI material?			<i>Staff should be briefed and trained on their personal responsibility.</i>

Checklist 5: Penalties	YES	NO	Comments
1) Does the UPA have forms to assist in assessing penalties?			<i>See DTSC regulations “Assessment of Administrative Penalties”.</i>
2) Does the UPA have a process for reviewing penalty calculations and obtaining supervisory concurrence?			
3) Does the UPA have confidentiality policies for penalty assessment documentation?			
4) Does the UPA have a Supplemental Environmental Project policy?			<i>See page 43. “Supplemental Environmental Projects”</i>
5) Does the UPA have a policy on penalty payment schedules?			
6) Does the UPA have a policy on the payment of interest when there is a penalty schedule?			
7) Does the UPA have procedure for collection and accounting of penalties?			
8) Does the UPA have procedures for pursuing uncollected penalties?			<i>See page 44.</i>
9) Does the UPA have a policy on cost recovery for inspection and enforcement resources?			<i>See page 42.</i>

Checklist 5: Penalties	YES	NO	Comments
10) Does the UPA have procedures for assessing a company's ability to pay a penalty?			<i>See page 41.</i>

Checklist 6: Boilerplate forms	YES	NO	Comment
1) Does the UPA have an approved boilerplate “Show Cause” letter?			
2) Does the UPA have an approved boilerplate enforcement order?			
3) Does the UPA have an approved boilerplate “Statement to Respondent”?			
4) Does the UPA have an approved boilerplate Notice of Defense form?			
5) Does the UPA have an approved boilerplate Stipulation to extend time?			
6) Does the UPA have an approved boilerplate Notice of Dismissal?			
7) Does the UPA have an approved boilerplate Notice of Final Order?			
8) Does the UPA have an approved boilerplate Consent Order?			
9) Does the UPA have an approved boilerplate Stipulations and Order?			

Checklist 6: Show Cause	YES	NO	Comments
Does the UPA have a boilerplate letter?			
Does the letter indicate a number of days for response?			
Does the letter include the UPA's intent to issue an AEO?			
Does the letter identify the alleged violations?			

APPENDIX II

EXAMPLES OF VIOLATIONS

Examples of Class I Violations

1. A violation that results in a release or serious threat of release of hazardous waste to the environment, for example:
 - Incompatible wastes stored adjacent to each other with no physical barrier for separation.
 - Waste stored or transported in incompatible, damaged, or deteriorated containers.
 - Failure to transfer wastes from deteriorated containers into sound containers.
2. A violation that involves the failure to assure that proper closure and post-closure activities will be undertaken, for example:
 - Failure of an owner/operator to develop closure or post-closure plans.
3. A violation that involves the failure to assure that hazardous wastes will be destined for and delivered to permitted or interim status facilities, for example:
 - Failure to manifest hazardous waste.
 - Use of an unregistered hazardous waste transporter.
 - Treatment, storage, or disposal at an unauthorized point.
4. Class I or II violations by a recalcitrant or chronic violator, including one who is violating outstanding enforcement orders, for example:
 - Failure to correct violations in accordance with a schedule of compliance.
5. A violation that involves failure to establish or maintain appropriate financial mechanisms to assure closure, post-closure, and liability coverage, for example:
 - Failure by an owner/operator to establish or maintain a financial assurance instrument.

Note: This is not intended to be an exhaustive list of potential Class I violations.

Examples of Class II Violations

Examples of potential Class II violations, depending on circumstances, are as follows:

- Failure of a generator to keep a copy of each manifest for at least three years.
- Failure to maintain a copy of the closure plan at the facility.
- Failure to submit the annual report in a timely manner.
- Failure to maintain an adequate contingency plan.
- Failure to adequately document hazardous waste training.
- Failure to note the date and nature of any repairs in the inspection log.
- Minor deficiencies in other record keeping requirements.
- Failure to update closure costs for inflation (although this may be Class I if such costs exceed \$100,000).

These examples would also constitute Minor violations, unless a particular occurrence meets one or more of the exceptions to the definition of Minor violations.

Note: This is not intended to be an exhaustive list of potential Class II violations.

Examples of Significant Non-Compliers

Depending on the circumstances, examples of potential Significant Non-Compliers include but are not limited to:

- Failure to comply with an enforcement order.
- Continuing Class I violation from preceding inspection within three years.
- Second Class I violation in three years.
- Repeating the same Class II violation within three years.
- Operating a facility without a permit or other grant of authorization.
- Disposal of hazardous waste at a non-authorized site.
- Failure to manage ignitable, reactive, or incompatible wastes as required by Title 22, CCR, §66264 and §66265.17(b)(1), (2), (3), (4) and (5).
- Failure of an owner/operator of a Treatment, Storage, or Disposal (TSD) facility to have a closure or post-closure plan or cost estimates.
- Failure to establish or maintain financial assurance for closure and/or post-closure care.
- Systemic failure to follow container/tank labeling requirements.
- Systemic use of containers in poor condition.

APPENDIX III

**HAZARDOUS WASTE PENALTY
REGULATIONS**

TITLE 22
Chapter 22. Enforcement, Inspections, and Informant Rewards
Article 3. Assessment of Administrative Penalties
CCR Section 66272.60 - 66272.70

- _ 66272.60. Applicability.
- _ 66272.61. Penalty Calculation.
- _ 66272.62. Determining the Initial Penalty for Each Violation.
- _ 66272.63. Initial Penalty Adjustment Factors.
- _ 66272.64. Multiple Violations.
- _ 66272.65. Multi-day Violations.
- _ 66272.66. Minor Violations Subject to a Penalty.
- _ 66272.67. Base Penalty.
- _ 66272.68. Adjustments to the Total Base Penalty.
- _ 66272.69. Final Penalty.
- _ 66272.70. Review.

_ 66272.60. Applicability.

(a) This article only applies to the assessment of administrative penalties in administrative enforcement orders issued pursuant to Health and Safety Code Section 25187. This article does not apply to minor violations as defined in Health and Safety Code Section 25117.6 unless the minor violation is subject to a penalty in accordance with Health and Safety Code Section 25187.8(g). This article does not apply to penalties assessed pursuant to Health and Safety Code Sections 25244.18(d)(2), 25244.21(a) and 25244.21(b) regarding requirements for source reduction evaluation review, plans, and reports. This article does not apply to the settlement of any enforcement action.

(b) For purposes of this article, "Enforcement Agency" is defined as any department, unified program agency, local health officer, or local public officer having the authority to issue administrative orders pursuant to Health and Safety Code Section 25187.

(c) The Enforcement Agency shall, pursuant to Health and Safety Code Section 25180(d), determine whether the person being assessed a penalty is being treated equally and consistently with regard to the same types of violations previously assessed against other violators.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25117.6, 25180(d), 25187, 25187.8(g), 25189.2, 25244.18(d)(2), 25244.21(a) and 25244.21(b), Health and Safety Code; and Section 11425.50, Government Code.

_ 66272.61. Penalty Calculation.

Administrative penalties assessed in administrative enforcement orders issued pursuant to Health and Safety Code Section 25187 shall be assessed following the procedures set forth in this article. The penalty assessed for any violation in accordance with this article shall not exceed the maximum penalty specified in statute.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

_ 66272.62. Determining the Initial Penalty for Each Violation.

(a) The Enforcement Agency shall determine an initial penalty for each violation, considering potential harm and the extent of deviation from hazardous waste management requirements. The Enforcement Agency shall use the matrix set forth in Subsection 66272.62(d) to determine the initial penalty for each violation.

(b) Potential Harm of the Violation

(1) The Enforcement Agency shall consider potential harm to public health and safety and the environment when using the matrix.

(2) The categories for degree of potential harm are defined as follows:

(A) Major -- The characteristics and/or amount of the substance involved present a major threat to human health or safety or the environment and the circumstances of the violation indicate a high potential for harm or, in the case of a violation of financial requirements, coverage is lacking or substantially below the required amount or it is certain or probable that the coverage would be absent or inadequate;

(B) Moderate -- The characteristics and/or amount of the substance involved do not present a major threat to human health or safety or the environment, and the circumstances of the violation do

not indicate a high potential for harm or, in the case of a violation of financial requirements, coverage is significantly below the required amount or it is possible that the coverage would be absent or inadequate;

(C) Minimal -- The threat presented by the characteristics and the amount of the substance or by the circumstances of the violation are low or, in the case of a violation of financial requirements, coverage is slightly below the required amount or it is unlikely that the coverage would be absent or inadequate.

(3) In determining the degree of potential harm, the Enforcement Agency shall consider the following factors:

- (A) The characteristics of the substance involved,
- (B) The amount of the substance involved,
- (C) The extent to which human life or health is threatened,
- (D) The extent to which animal life is threatened,
- (E) The extent to which the environment is threatened, and
- (F) The extent to which potable water supplies are threatened.

(4) Potential harm for violations of financial requirements shall be determined by considering the amount of closure, post closure, or corrective action costs for which there is no financial assurance or the amount of required liability coverage that is absent, and the likelihood that injury or damages, if they occur, will not be compensated due to an inadequacy in the coverage.

(5) A violation must involve the actual management of hazardous waste including the absence of adequate financial assurance for closure, post closure, corrective action or financial liability coverage, as distinguished from being a "record-keeping" violation, for the violation to have a major potential for harm. "Record-keeping," for purposes of this article, means a requirement to record information, to retain records, and to have documents available for inspection. "Record-keeping" does not include a substantive requirement such as the requirement to have a contingency plan, a waste analysis plan, or a closure plan. The following examples illustrate what is considered "record-keeping" and what is considered a violation that could have a major potential for harm.

(A) A failure to record inspections that were in fact completed is a record-keeping violation and would not have a major potential for harm. A failure to conduct inspections according to the schedule is not a record-keeping violation and could have a major potential for harm depending on the circumstances.

(B) A failure to retain a copy of a manifest is a record-keeping violation and would not have a major potential for harm. A failure to use a manifest for a shipment of hazardous waste is not a record-keeping violation and could have a major potential for harm depending on the circumstances.

(C) A failure to have available for inspection a waste analysis plan that does in fact exist is a record-keeping violation and would not have a major potential for harm. A failure to have a waste analysis plan, or a failure to have a waste analysis plan available to staff who are to implement the plan, is not a record-keeping violation and could have a major potential for harm depending on the circumstances.

(6) Financial violations that are strictly paperwork errors or omissions that do not affect actual functioning of adequate financial assurance for closure, post closure, corrective action, or financial liability coverage are record-keeping violations. Violations involving the absence of adequate financial assurance for closure, post closure, corrective action, or financial liability coverage are hazardous waste management violations, not record-keeping violations.

(7) Groundwater monitoring record-keeping is a fundamental part of the groundwater monitoring requirements. Groundwater monitoring record-keeping violations may have a major,

moderate, or minimal potential for harm. The category selected for potential harm shall be based on the extent to which the violation may lead directly to environmental harm, have a potential for harm, or cause an inability to detect releases to groundwater.

(c) Extent of Deviation of the Violation

(1) The Enforcement Agency shall consider the extent of deviation from hazardous waste management requirements when using the matrix set forth in this section.

(2) The categories for extent of deviation from requirements are defined as follows:

(A) Major -- The act deviates from the requirement to such an extent that the requirement is completely ignored and none of its provisions are complied with, or the function of the requirement is rendered ineffective because some of its provisions are not complied with.

(B) Moderate -- The act deviates from the requirement, but it functions to some extent although not all of its important provisions are complied with.

(C) Minimal -- The act deviates somewhat from the requirement. The requirement functions nearly as intended, but not as well as if all provisions had been met.

(3) For requirements with more than one part, the Enforcement Agency shall consider the extent of violation in terms of the most significant requirement.

(4) For a single requirement, the range of potential deviation from the requirement may vary. For example, if a facility has no contingency plan, the deviation would be major. If a facility has a contingency plan but significant elements are omitted, the deviation would be moderate. If a facility has a contingency plan with only one or two minor elements missing, the deviation would be minimal.

(d) The matrix set forth in this subsection shall be used to determine the initial penalty for a violation. The Enforcement Agency shall select a penalty amount from the range provided in the matrix cell that corresponds to the appropriate extent of deviation and the potential harm categories. The numbers in parenthesis in each cell of the following matrix are the midpoints of the range.

DETERMINATION OF INITIAL PENALTY MATRIX
(in dollars)

EXTENT OF DEVIATION	ACTUAL AND POTENTIAL HARM		
	Major	Moderate	Minimal
Major	25,000 (22,500) 20,000	20,000 (17,500) 15,000	15,000 (10,500) 6,000
Moderate	20,000 (17,500) 15,000	15,000 (10,500) 6,000	6,000 (4,000) 2,000
Minimal	15,000 (10,500) 6,000	6,000 (4,000) 2,000	2,000 (1,000) 0

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

_ 66272.63. Initial Penalty Adjustment Factors

(a) After determining the initial penalty, the Enforcement Agency shall adjust the initial penalty based on the violator's intent in committing the violation using the following guidelines:

ADJUSTMENT FACTORS FOR VIOLATOR'S INTENT

ADJUSTMENT FACTOR	CIRCUMSTANCE
Downward Adjustment of 100%	Violation was completely beyond the control of the violator.
Downward Adjustment of 0 to 50%	Violation occurred despite good faith efforts to comply with regulation(s).
No Adjustment	Violation indicated neither good faith efforts nor intentional failure to comply.
Upward Adjustment of 50% to 100%	Violation was a result of intentional failure to comply.

(b) Adjustment of the initial penalty in accordance with subsection (a) may result in an adjusted initial penalty that is higher or lower than the range presented in the originally selected matrix cell.

(c) The initial penalty shall be increased by the amount of any economic benefit gained or cost of compliance avoided by the violator as a result of noncompliance up to the statutory maximum for each violation. Economic benefit includes, but is not limited to, avoided costs, increased profits, having the use of capital from delayed or avoided costs, and avoided interest.

(d) The adjusted initial penalty for a violation shall not exceed the statutory maximum.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

_ 66272.64 Multiple Violations

(a) At the discretion of the Enforcement Agency, a single initial penalty may be assessed for multiple violations. Multiple violations subject to this section are multiple instances of the same violation, where each instance is a violation in itself.

(b) The assessment of a single initial penalty may be appropriate for multiple violations in the following cases:

(1) The facility has violated the same requirement at one or more locations (e.g. units) within the facility

(2) The violation occurs on separate occasions, unless the facility has been notified of the violation and has had sufficient time to correct the violation, and the violation is not a violation that continues uninterrupted for more than one day;

(3) When violations are not independent or are not substantially distinguishable. For such violations, the Enforcement Agency shall consider the extent of violation in terms of the most significant violation.

(c) Where it is necessary to deprive the violator of the economic benefit of multiple violations, the Enforcement Agency shall cite such violations separately and assess an initial penalty for each violation.

(d) The single initial penalty for multiple violations is to be determined as provided in Sections 66272.62 and 66272.63.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

66272.65 Multi-day Violations

(a) Each day a violation continues is a separate and distinct violation. The penalty for a continuing violation shall be determined according to this section.

(1) The initial penalty for the first day of violation shall be determined as provided in Sections 66272.62 and 66272.63;

(2) For days following the first day of violation, the multiday component of the penalty shall be calculated by determining two percent of the adjusted initial penalty and multiplying that value by the number of days the violation occurred after the initial day.

(b) If the Enforcement Agency fails to respond in a timely manner to the violator's written response to an inspection report, the Enforcement Agency may not seek penalties for continuing violations in accordance with Health and Safety Code Section 25185(c)(3).

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25185, 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

66272.66 Minor Violations Subject to a Penalty.

When a "minor violation," as defined by Health and Safety Code Section 25117.6, is subject to a penalty for any of the reasons specified in Health and Safety Code Section 25187.8(g), including that a penalty is warranted or required by federal law, the penalty for that violation shall be determined in accordance with this Article. Written findings that set forth the basis for the Enforcement Agency's determination to assess a penalty for a minor violation shall be made in accordance with Health and Safety Code Section 25187.8(g)(2).

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25117.6, 25187.8 and 25189 Health and Safety Code; and Section 11425.50, Government Code.

66272.67 Base Penalty

(a) If a violation is a one day occurrence, the base penalty for that violation is the adjusted initial penalty as determined pursuant to [Sections 66272.62](#) and [66272.63](#).

(b) The base penalty for multiple violations is the adjusted initial penalty determined pursuant to [Section 66272.64](#).

(c) The base penalty for multiday violations is the adjusted initial penalty for the first day of violation determined pursuant to Sections 66272.62 and 66272.63 plus the penalty for the additional days of violation pursuant to Section 66272.65.

(d) The total base penalty for an enforcement action is the sum of the base penalties for all violations.

(e) The total base penalty shall not exceed the statutory maximum.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2 Health and Safety Code; and Section 11425.50, Government Code.

66272.68 Adjustments to the Total Base Penalty.

The Enforcement Agency shall adjust the total base penalty considering each of the following adjustment factors:

(a) Cooperation: The Enforcement Agency shall consider the violator's cooperation and efforts to return to compliance. Cooperation in achieving compliance is the standard and all necessary good faith efforts to comply with requirements must be made. Adjustments shall be based on the violator's efforts to return to compliance after being notified of the violations by the Enforcement Agency. The adjustment shall be made using the following guidelines:

ADJUSTMENT FACTORS FOR COOPERATION

DEGREE OF COOPERATION/ EFFORT	ADJUSTMENT FACTOR	CIRCUMSTANCE
Extraordinary	Downward adjustment of 25 percent	Violator exceeded the minimum requirements in returning to compliance or returned to compliance faster than requested.
Good Faith	No adjustment	Violator demonstrated a cooperative effort.
Recalcitrance	Upward adjustment of 25 percent	Violator failed to cooperate, delayed compliance, hid a violation, created unnecessary obstacles to achieving compliance, or the compliance submittal failed to meet requirements.
Refusal	Upward adjustment of 50 to 100 percent	Violator intentionally failed to return to compliance with the regulations or to allow clean-up operations to take place. This does not include refusal to allow inspections.

(b) Prophylactic Effect: The total base penalty may be adjusted upward or downward to ensure that the penalty is sufficient to provide a prophylactic effect on both the violator and the regulated community as a whole.

(c) Compliance History: The total base penalty may be decreased by five percent for each previous consecutive Enforcement Agency inspection report that has had no violations noted, up to a total reduction of ten percent. A separate, additional downward adjustment of 15 percent may be granted if the violator has a current International Organization for Standardization (ISO) 14001 Certificate. The total base penalty may be increased if the violator has demonstrated a history of noncompliance over the past five (5) years. The maximum adjustment factor for compliance history is an upward adjustment of 100 percent. When adjusting the penalty for compliance history, the Enforcement Agency shall consider the following criteria:

- (1) Previous violations at the site in question receive more weight than previous violations at another site owned or operated by the same person;
- (2) Recent violations receive more weight than older violations;
- (3) The same or substantially similar previous violations receive more weight than previous unrelated violations.

(d) Ability to Pay: If the violator has provided the Enforcement Agency with the financial information necessary to assess the violator's ability to pay, the payment of the final penalty may be extended over a period of time if immediate, full payment would cause, in the judgment of the Enforcement Agency, extreme financial hardship. If extending the penalty payment over a period of time would cause, in the judgment of the Enforcement Agency, extreme financial hardship, the penalty may be reduced. No adjustment for ability to pay may be made if the penalty has been adjusted upward because of failure to cooperate, pursuant to subsection (a), or because of compliance history, pursuant to subsection (c).

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2 Health and Safety Code; and Section 11425.50, Government Code.

66272.69 Final Penalty.

The final penalty consists of the total base penalty, as defined in Section 66272.67, with any adjustments made pursuant to the adjustment factors set forth in Section 66272.68. The final penalty shall not exceed the statutory maximum.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2 Health and Safety Code; and Section 11425.50, Government Code.